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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LOS ANGELES COMMUNITY COLLEGE DISTRICT, Cross-complainant and Respondent, v. ROOSEVELT LOFTS, LLC, Cross-defendant and Appellant.	B266057 (Los Angeles County Super. Ct. No. BC377008)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Reversed in part and affirmed in part.

Steckbauer Weinhart, J. Thomas Cairns, Jr.; Law Offices of H. Joseph Nourmand and H. Joseph Nourmand for Cross-defendant and Appellant.

Best Best & Krieger, John H. Holloway, Scott W. Ditfurth and Thomas M. O'Connell for Cross-complainant and Respondent.

A jury found that appellant Roosevelt Lofts, LLC (Roosevelt Lofts) engaged in fraud in acquiring an easement from respondent Los Angeles Community College District (LACCD), and awarded damages to LACCD. Roosevelt challenges two items of damages, namely, the costs of replacing a service elevator owned by LACCD and attorney fees awarded under the "tort of another" doctrine. We agree with Roosevelt Lofts' contentions regarding those items of damages, and thus reverse the judgment with respect to them.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. *Background*

This is the third time this case has come before us. The underlying litigation concerns a private 30-foot by 90-foot alley that runs from Wilshire Boulevard to three buildings. The 700 Wilshire Building and the 770 Wilshire Building adjoin the eastern and western edges of the alley, and the Roosevelt Building sits at the alley's south end. During the pertinent period, the owners of the 700 Wilshire Building and the 770 Wilshire Building each owned one-half

of the alley, although the owners of all three buildings shared a common easement over the alley.

Prior to the underlying litigation, which commenced in 2007, 700 Wilshire Properties owned the 700 Wilshire Building, together with one-half of the alley and the appurtenant easement, and LACCD owned the 770 Wilshire Building, together with the other half of the alley and appurtenant easement. At that time, Roosevelt Lofts owned the real property underlying the Roosevelt Building, and several other parties owned the building and appurtenant easement. Those parties were Alliance Property Investments, Inc., Carla Ridge, LLC, Maverick Holdings, LLC, S & M Yashoua Investments, and Desert Field, LLC (collectively, Alliance).

Before 2007, the buildings used the alley for commercial deliveries and as a means of accessing their trash dumpsters and loading docks. The Roosevelt Building and the 700 Wilshire Building were constructed with loading docks facing the alley. In contrast, the 770 Building was constructed with a subterranean service elevator located directly on the alley. When in use, the elevator partially blocked the alley; when not in use, it rested beneath closed doors that formed part of the alley's surface.

In 2004 or 2005, Roosevelt Lofts initiated a plan to convert the Roosevelt Building from an office building to a building containing residential condominiums. Later, the project's general contractor negotiated with LACCD for an easement to permit the installation of new electrical conduit

wire under the alley. In September 2007, LACCD executed a written agreement granting the conduit easement.

During the condominium conversion project, the Roosevelt Building's loading dock was replaced by a parking garage exit. 700 Wilshire Properties and LACCD objected to the project insofar as it aimed at introducing private vehicular traffic in the alley; in addition, 700 Wilshire Properties contended that other work related to the project had been conducted on its side of the alley without its permission.

B. *Complaint and Cross-Complaints*

In 2007, 700 Wilshire Properties commenced the underlying litigation against Roosevelt Lofts and Alliance. Its complaint asserted claims for declaratory and injunctive relief, alleging that the proposed use of the alley for private vehicular traffic would overburden the alley easement. In addition, the complaint asserted claims for trespass and nuisance based on allegedly unauthorized work on the alley, including a new concrete surface, a drainage system, an underground conduit, and a permanent electronic gate at the entrance of the alley. LACCD was identified as an indispensable party to the action.[1]

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[1] LACCD was joined in the action only because it was a co-owner of the alley easement. 700 Wilshire named LACCD as a defendant solely with respect to its claim for
(Fn. continued on next page.)

LACCD filed a cross-complaint against Roosevelt Lofts and Alliance, seeking declaratory and injunctive relief on the ground that private vehicular traffic in the alley constituted a dangerous condition. The complaint also sought "Damages And An Injunction For Intentional Misrepresentation," asserting that Roosevelt Lofts and Alliance made false representations and promises in order to obtain the conduit easement, and intentionally concealed their plan to use the alley for private vehicular traffic. The complaint alleged that in order to secure the conduit easement, Roosevelt Lofts and Alliance Roosevelt promised to install a new service elevator and repave the alley without altering its level. According to the complaint, LACCD received no new elevator, and the work performed in the alley not only damaged its existing elevator, but created a dangerous condition, as the new paving raised the alley's surface several inches above the elevator doors. The complaint further asserted that if LACCD had known of the plan to introduce private passenger traffic into the alley, it would have denied the conduit easement.

Alliance filed a cross-complaint against 700 Wilshire Properties for apportionment of the costs of work done in the alley, alleging that the work performed was necessary to preserve the easement relating to access to the buildings.

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declaratory relief regarding the parties' rights relating to the shared alley easement.

C. *First Trial and Judgment*

A jury trial was conducted on the legal issues presented by the parties' claims. Following the presentation of LACCD's evidence, the trial court granted Roosevelt Lofts' and Alliance's motion for nonsuit on LACCD's fraud claim, concluding there was no showing of damages attributable to fraud. The jury found, inter alia, that the work performed on 700 Wilshire Properties' portion of the alley was unauthorized, and that the proposed use of the alley for private vehicular traffic would overburden the alley easement.

After the jury rendered its findings, the trial court took the matter under submission to resolve the remaining equitable issues. The court determined that it was not bound by the jury's finding that proposed change in use of the alley would overburden the alley easement, independently concluded that the proposed change would not overburden that easement, and awarded Roosevelt Lofts and Alliance injunctive relief. A judgment was entered incorporating a permanent injunction barring LACCD and 700 Wilshire Properties from interfering with the free passage of vehicles and pedestrians in the alley.

D. *First Appeal*

LACCD and 700 Wilshire Properties noticed an appeal from the judgment. While that appeal was pending, Roosevelt Lofts filed a Chapter 11 bankruptcy petition. At the time, its bankruptcy estate included the judgment, as

well the Roosevelt Building and the appurtenant alley easement, both of which Roosevelt Lofts had acquired. Later, the bankruptcy court issued an order confirming a reorganization plan that transferred those assets to GS Roosevelt, LLC (GSR). The plan further provided that subject to certain conditions, the asset transfer imposed no liability for "any [c]laim or [i]nterest against [Roosevelt Lofts] that arose or was asserted" prior to the plan's effective date.

Following the confirmation of the reorganization plan, Roosevelt Lofts and GSR filed a motion in this court for substitution of parties in the first appeal. We granted the motion, concluding that because GSR was then "the sole owner of [the pertinent] real property and appurtenant easement and . . . the judgment that forms the subject of [the] appeal," GSR was properly "substituted in place . . . of [Roosevelt Lofts] as [r]espondent for all purposes in this action."

In November 2011, in an unpublished opinion, we reversed the judgment and permanent injunction against LACCD and 700 Wilshire Properties. (*700 Wilshire Properties v. Alliance Property Investments, Inc. et al.* (Nov. 8, 2011, B225501, B226613 review den. Feb. 15, 2012, S198808) 2011 Cal.App. Unpub. LEXIS 8558 (*700 Wilshire*).) We concluded that the proposed use of the alley for private vehicular traffic would overburden the alley easement, and that LACCD and 700 Wilshire Properties were entitled to a judgment in their favor on their claims for declaratory and

injunctive relief. We also reversed the nonsuit regarding LACCD's cross-complaint for fraud and remanded for a new trial of the fraud claim. GSR filed a petition for review in the California Supreme Court, which was denied.

E. *Proceedings Following Remand*

After the matter was remanded to the trial court, LACCD and 700 Wilshire Properties sought to secure immediate injunctive and declaratory relief while severing litigation of LACCD's fraud claim. At a hearing on their request for a preliminary injunction, GSR made a purported special appearance under the name of an affiliated entity, contending that because it was not a party to the action, the trial court lacked personal jurisdiction over it and thus could not enjoin its use of the alley. The trial court issued a preliminary injunction barring Roosevelt Lofts -- but not GSR -- from using the alley for garage access.

Notwithstanding the limited scope of the preliminary injunction, LACCD and 700 Wilshire Properties attempted to limit access to the Roosevelt Building's garage through the alley. GSR sought emergency relief in the bankruptcy court, asserting that it was not subject to our decision in *700 Wilshire*. GSR contended that the decision relied solely on Roosevelt Lofts' conduct prior to the confirmed reorganization plan, which exempted GSR from liability for any such conduct.

In an order dated August 28, 2012, the bankruptcy court concluded that although the confirmed reorganization

plan eliminated GSR's liability for Roosevelt Lofts' conduct before the plan's effective date, GSR remained liable for its own independent conduct. The order stated that the plan did not bar injunctive relief against GSR if the trial court found that after the effective date of the confirmed reorganization plan, GSR engaged in acts rendering it "independent[ly] liab[le]" for injunctive relief.

In October 2012, the trial court found no such acts, and denied LACCD's and 700 Wilshire Properties' request for a preliminary injunction and judgment restricting GSR's use of the alley; in addition, the court severed litigation of LACCD's fraud claim against Roosevelt Lofts from the litigation regarding injunctive and declaratory relief. Following the trial court's denial of the preliminary injunction, the bankruptcy court barred LACCD and 700 Wilshire Properties from blocking or impeding GSR's access or use of the alley easement. In so ruling, however, the bankruptcy court stated that state courts were free to determine the scope of the alley easement and the validity of any action by Roosevelt Lofts relating to the scope of the alley easement.

F. *Commencement of Second Appeal*

LACCD noticed an appeal from the trial court's October 2012 order denying a preliminary injunction and judgment. Later, in January 2013, the trial court declined to enter a declaratory judgment and injunction barring GSR from using the alley as access to the Roosevelt Building's

garage. LACCD sought relief in this court from that ruling by petition for writ of mandate.

G. *Quiet Title Action*

In January 2013, LACCD and 700 Wilshire Properties initiated a new action in the superior court against GSR for quiet title, declaratory relief, and an injunction. The suit was filed in response to GSR's contention that it was not a party to the underlying action and not bound by our decision in *700 Wilshire*. Through an affiliated entity, GSR sought an injunction from the bankruptcy court barring prosecution of that action. In denying that request, the bankruptcy court stated that it made no ruling whether GSR's activities during the first appeal before us waived or modified the immunity from successor liability for Roosevelt Lofts' conduct afforded to GSR under the confirmed reorganization plan. The quiet title action resulted in a judgment in favor of LACCD.

H. *LACCD's Second Amended Cross-Complaint*

In February 2013, LACCD filed its second amended cross- complaint against Roosevelt Lofts, which contained claims for fraud and indemnity. The complaint alleged the following facts: Roosevelt Lofts and Alliance engaged Urban Builders, Inc. (Urban Builders), as the general contractor for the condominium conversion project. In 2007, Urban Builders negotiated with representatives of LACCD in order to secure the conduit easement. During the negotiations,

Urban Builders denied that the project would change the manner in which the alley was used. Urban Builders further promised to make improvements to the alley, including providing LACCD with a new service elevator. Those promises regarding improvements were set forth in a document executed by Calvin Hall of Urban Builders, which accompanied the agreement by which LACCD granted the conduit easement. According to the complaint, LACCD would have denied the conduit easement and taken prompt action to halt the condominium conversion project had it known of the plan to introduce private passenger traffic into the alley. The complaint asserted that LACCD's damages included the costs of a new service elevator -- which Roosevelt Lofts promised but never provided -- and attorney fees incurred in litigation involving GSR, including Roosevelt Lofts' bankruptcy proceeding, the first appeal before us, and the quiet title action.

I. *Decision in Second Appeal*

In October 2013, in an unpublished opinion, we reversed the trial court's October 2012 order denying a preliminary injunction and judgment against GSR. (*Los Angeles Community College District v. GS Roosevelt, LLC* (Oct. 2, 2013, B244809, B247683). We concluded that GSR, in seeking to be substituted in place of Roosevelt Lofts as respondent in the first appeal, made a general appearance by which it consented to this court's jurisdiction. We further concluded that GSR was bound by our decision in that

appeal, insofar as we held that LACCD and 700 Wilshire Properties were entitled to declaratory and injunctive relief because the use of the alley for private vehicular traffic would overburden the alley easement. In so concluding, we found nothing in the bankruptcy court's rulings precluding us from barring GSR from overburdening the alley easement. Because LACCD prevailed in the appeal, we dismissed its petition for writ of mandate as moot.

On June 4, 2014, the trial court entered a judgment against GSR providing for injunctive and declaratory relief relating to the alley easement.

J. *Trial on LACCD's Fraud Claim*

A jury trial on LACCD's fraud claim against Roosevelt Lofts was conducted in April 2015.[2] LACCD presented evidence that in 2007, Massoud Aaron Yashouafar was president of Roosevelt Lofts and of Urban Builders, the general contractor for the condominium conversion project. In June 2007, Calvin Hall of Urban Builders met with Sharine Ellen Borchetta, then LACCD's interim Director of Business Services, and requested the conduit easement. Hall told Borchetta that the proposed work included replacing the alley's surface and installing some gates. In a document dated June 21, 2007, Hall set forth the scope of

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[2] Prior to the trial, the court granted Roosevelt Lofts' motion for summary adjudication regarding LACCD's indemnity claim.

the proposed work, stating, inter alia, that Urban Planners would install a new service elevator and replace the alley's surface with a concrete slab that would "slope and drain properly as needed."[3] Although Borchetta asked whether the condominium conversion project involved a change in the alley's existing uses, Hall disclosed no plans to change those uses. In September 2007, Borchetta executed an agreement granting that easement. At some point, Yashouafar became aware of Hall's efforts to secure the conduit easement, and never objected to them.[4]

According to LACCD's showing, Hall's failure to disclose the plan to use the alley for private vehicular traffic was material to its decision regarding the conduit easement. Borchetta testified that had she been aware of any such plan, she would have denied the conduit easement. Kevin Jeter, LACCD's associate general counsel, also testified that had he been aware of the plan to use the alley for private vehicular traffic, he would have taken prompt action to block the plan and advised Borchetta not to grant the

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[3] In July 2007, Borchetta and Gary Moller of Urban Builders executed a memorandum of understanding regarding the easement that contained no reference to several promises set forth in the June 21, 2007 document, including the promise relating to the new service elevator.

[4] Yashouafar, who testified as an adverse witness (Evid. Code, § 776), asserted that Hall acted solely on behalf of Urban Builders in securing the easement agreement.

conduit easement. Jeter stated that private vehicular traffic in the alley constituted a safety hazard to the occupants of the 700 Wilshire Building and the 770 Wilshire Building.

Architect Matthew James Nardella testified that the principal alternative pathway for the electrical conduit was a route along Flower Street. He opined that obtaining permission to use that route entailed a lengthy, complicated, and "relatively costly" process involving the potential for public hearings.

LACCD provided evidence that it incurred damages directly relating to the conduit easement. Yashouafar and Hall testified that no new service elevator was installed due to lack of funds to complete the condominium conversion project. According to Hall, the project "ran out of money" because the "real estate crashe[d] and the market crashe[d]." Jeter and Nardella testified that in replacing the alley's surface, Urban Builders raised its level several inches above the elevator's doors, and damaged the doors themselves. To prevent further damage to the doors and elevator system, LACCD installed bollards to prevent vehicles from driving over the doors. Nardella estimated the costs of correcting deficiencies relating to the work totaled $299,268, including the costs of installing a new elevator.

LACCD also presented evidence that it incurred attorney fees as damages under the "tort of another" doctrine. Jeter testified that in the course of Roosevelt Lofts' bankruptcy proceeding, the underlying action, and the quiet title action against GSR, LACCD was required to

engage in litigation involving GSR. In the bankruptcy proceeding, after LACCD asserted a claim as a creditor, the bankruptcy court directed that buyers of condominiums in the Roosevelt Building be advised of the potential consequences of the underlying litigation. In the underlying action, GSR appeared as respondent in the first appeal and later opposed LACCD's requested injunctive and declaratory relief. Later, LACCD initiated the quiet title action against GSR because the bankruptcy court advised LACCD that only such an action would yield a judgment that would "run with the land and bind all the future owners." Forensic accountant Karl Elhert estimated that LACCD incurred attorney fees totaling $294,271 in the litigation involving GSR.[5]

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[5] Roosevelt Lofts called two witnesses in presenting its defense. Robert Grossman, a mechanical engineer, testified that he was Urban Builders' construction manager for the condominium conversion project. According to Grossman, the project's plans, which disclosed an intention to use the alley for a limited amount of private vehicular traffic, were prepared no later than February 2006 and submitted to the City of Los Angeles for approval. Grossman also stated that there were alternative possible routes for the electrical conduit, in addition to the alley.

Yashouafar testified that the condominium conversion project has generated widespread interest, and was the subject of several public hearings.

K. *Jury's Special Verdicts and Judgment*

LACCD submitted its fraud claim to the jury on theories of intentional misrepresentation, promissory fraud, and concealment. The jury returned special verdicts that Roosevelt Lofts engaged in intentional misrepresentation and concealment, but not promissory fraud. The jury awarded damages totaling $661,070, including $91,273 for the costs of installing a new service elevator and $294,271 in attorney fees under the "[t]ort of [a]nother" doctrine, plus $50,881 in pre-judgment interest regarding those fees. After entering a judgment in favor of LACCD and against Roosevelt Lofts in accordance with the special verdicts, the trial court denied Roosevelt Lofts' motion for a new trial. This appeal followed.

DISCUSSION

Roosevelt Lofts challenges the judgment to the extent it awards as damages the costs of a new service elevator and attorney fees under the "tort of another" doctrine. For the reasons discussed below, we conclude that these items of damages were improperly awarded.

A. *Costs of a New Service Elevator*

Roosevelt Lofts maintains that the costs of a new service elevator cannot be awarded as damages for two reasons. First, Roosevelt Lofts contends the award is irreconcilable with the jury's finding that there was no promissory fraud. Second, Roosevelt Lofts contends the

award is erroneous under any fraud theory, arguing that absent special circumstances not present here, defrauded parties may recover only "out-of-pocket" damages, as set forth in Civil Code section 3343.[6]

1. *No Damages For Promissory Fraud*

At the outset, we agree that in view of the jury's special verdicts, the costs of a new service elevator cannot be awarded as damages for promissory fraud. As our Supreme Court had explained, "[a] promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.] [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. [Citations.] In such cases, the plaintiff's claim does not depend on whether the defendant's promise is ultimately enforceable as a contract." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*).)

Here, the jury determined that the key requirements for promissory fraud were absent, and attributed no damages to that theory. The jury found that Roosevelt Lofts made "a promise" to LACCD that it intended to perform when made but failed to carry out, thus apparently crediting Yashouafar's and Hall's testimony that no new service

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[6] All further statutory citations are to the Civil Code, unless otherwise indicated.

elevator was installed due to lack of funds. In accordance with the instructions set forth on the special verdict form regarding promissory fraud, the jury refrained from rendering any finding relating the unfulfilled promise to LACCD's harm. The jury's findings thus foreclose any award for Roosevelt Lofts' failure to install a new service elevator predicated on a theory of promissory fraud.

2. *No Recovery Under Remaining Fraud Theories for Failure to Install New Service Elevator*

Because the jury found that LACCD suffered harm as the result of intentional misrepresentation and concealment, the remaining issue is whether the costs of a new service elevator may be awarded as damages under those theories. As explained below (see pt. A.2.b. of the Discussion, *post*), LACCD's entitlement to damages for intentional misrepresentation and concealment was governed by the measure of damages set forth in section 3343, which does not authorize a recovery for the breached promise to provide a new service elevator.

a. *Governing Principles*

The recovery of damages for fraud differs in key respects from the recovery of damages for breach of a contract. Contract damages are ordinarily governed by a "benefit of the bargain" measure that compensates for a "lost expectation interest" (*New West Charter Middle School v. Los Angeles Unified School Dist.* (2010) 187 Cal.App.4th 831,

844), subject to special restrictions based on the expectations of the parties at the inception of the contract (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515-516 (*Applied Equipment Corp.*)). "Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable. [Citations.]" (*Applied Equipment Corp.*, *supra*, 7 Cal.4th at p. 515.)

In fraud actions, there are two potential basic measures of damages. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 (*Alliance Mortgage Co.*).) Ordinarily, a defrauded party is limited to recovering his or her out-of-pocket loss. (*Ibid.*) "The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received.'" (*Ibid.*, quoting *Stout v. Turney* (1978) 22 Cal.3d 718, 725 (*Stout*).) Section 3343 provides that the out-of-pocket measure applies in fraud cases involving "the purchase, sale or exchange of property . . . ." That statute also permits a defrauded party to recover for "'additional damage'" attributable to the fraud, including

damage to other property (*Sixta v. Ochsner* (1960) 187 Cal.App.2d 485, 490-491).[7]

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[7] Section 3343 provides in pertinent part: "(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:

(1) Amounts actually and reasonably expended in reliance upon the fraud.

(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.

(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

(Fn. continued on next page.)

Damages for fraud are also potentially assessed under a benefit-of-the-bargain measure. (*Alliance Mortgage Co.*, *supra*, 10 Cal.4th at p. 1240.) That measure "'is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.'" (*Ibid.*, quoting *Stout*, *supra,* 22 Cal.3d at p. 725.)

Prior to the enactment of section 3343, courts regarded the benefit-of-the-bargain measure, when applicable, as authorized under section 3333, which states that "[f]or the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly

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(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

(b) Nothing in this section shall do . . . the following:

(1) Permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof . . . ."

provided by [the Civil Code], is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (*Cory v. Villa Properties* (1986) 180 Cal.App.3d 592, 598-599.) Following the enactment of section 3343, some courts have held that a defrauded party may recover benefit-of-the-bargain damages under section 3333 when the fraud is carried out by a fiduciary. (*Streblel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 748 [discussing cases].)

b. *Analysis*

We conclude that the appropriate measure of damages for LACCD's fraud claims is provided by section 3343, which does not support a recovery for the costs of a new service elevator. In *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 805-806, the plaintiff alleged that a developer fraudulently induced him to grant a right-of-way for the purpose of widening a road by falsely promising not to claim an adjoining "'slope'" easement. The appellate court held that section 3343 provided the proper measure of damages because the developer was not the plaintiff's fiduciary, and no other circumstance warranted the application of the benefit-of-the-bargain measure. (*Id.* at pp. 811-813.) Because rights-of-way are easements (§ 801), *Housley* establishes that section 3343 provides the measure of damages for LACCD's fraud claim, as it arises from an agreement granting a conduit easement to a nonfiduciary.

The record discloses no basis for recovery of the costs of a new service elevator under section 3343. Although Jeter and Nardella testified that Urban Builders, in replacing the alley's surface, damaged the doors of the existing elevator, neither suggested that the damage required the replacement of the elevator.[8] Indeed, Jeter stated that LACCD installed bollards around the elevator doors and continued to use the elevator. Furthermore, in seeking damages, LACCD sought the costs of a new service elevator on the basis of Roosevelt Lofts' unfulfilled promise, and offered no evidence identifying the costs of repairing the existing elevator doors. As explained above (see pt. A.2.a. of the Discussion, *ante*), section 3343 does not authorize a recovery for LACCD's expectancy interest in the promised elevator.

Relying on *Robinson Helicopter, Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979 (*Robinson Helicopter*), LACCD contends its fraud claim supports a recovery for the costs of a new service elevator as benefit-of-the-bargain damages. In our view, that contention reflects a misapprehension of *Robinson Helicopter,* which examined the application of the economic loss rule. (*Id.* at pp. 988-993.) That rule provides that "'"'[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working

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[8] Nardella testified that some water appeared to be leaking through the elevator doors, but stated that a pump would remediate that problem.

properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses.'" . . . The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise.'" (*Id*. at p. 988).) The function of the rule is to "'prevent[] the law of contract and the law of tort from dissolving one into the other.' [Citation.]" (*Ibid*., quoting *Rich Products Corp. v. Kemutec, Inc.* (E.D. Wis. 1999) 66 F.Supp.2d 937, 969.)

In *Robinson Helicopter*, the plaintiff bought helicopter clutches from the defendant, which was obligated by contract to manufacture the clutches in accordance with the plaintiff's specifications and supply written certificates of compliance when the clutches were delivered. (*Robinson Helicopter*, *supra*, 34 Cal.4th at pp. 985-987.) In supplying the clutches, the defendant downgraded their quality without reflecting that change in the certificates of compliance or otherwise notifying the plaintiff. (*Ibid*.) After a jury awarded the plaintiff damages for breach of contract and fraud, the Court of Appeal ruled that the economic loss rule barred the recovery of tort damages. (*Id*. at p. 988.)

Reversing the judgment of the Court of Appeal, our Supreme Court held that the economic loss rule did not bar a recovery of tort damages because the fraud was independent of the breach of contract. (*Robinson Helicopter*, *supra*, 34 Cal.4th at pp. 990-991.) In so concluding, the court quoted the following passage from *Lazar, supra,* 12

Cal.4th at page 646: "In pursuing a valid fraud action, a plaintiff advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future. [Citation.] Because of the extra measure of blameworthiness inhering in fraud, and because in fraud cases we are not concerned about the need for 'predictability about the cost of contractual relationships' [citation], fraud plaintiffs may recover 'out-of-pocket' damages in addition to benefit-of-the bargain damages.'" (*Robinson Helicopter*, *supra*, 34 Cal.4th at p. 992.)

Relying on the discussion in *Robinson Helicopter* centered on the proposition from *Lazar*, LACCD contends that *Robinson Helicopter* "dispositively supports" its recovery of the costs of the new service elevator. However, viewed in context, the *Lazar* proposition means only that a party asserting fraud and breach of contract claims may, in suitable circumstances, recover out-of-pocket damages for fraud *and* benefit-of-the bargain damages for breach of contract, not that a defrauded party may recover both benefit-of-the bargain and out-of-pocket damages for fraud.

In *Lazar*, a terminated employee sued his employer for breach of contract and fraud, alleging that he had been induced by false promises from his employer to leave his former job and work for the employer. (*Lazar, supra*, 12 Cal.4th at pp. 638-649.) In concluding that the employee was entitled to assert a claim for promissory fraud in addition to his breach of contract claim, our Supreme Court stated the proposition described above. (*Id.* at pp. 645-646.)

The court further held that the employee was permitted to seek damages for promissory fraud and breach of contract, subject to the rule against double recovery. (*Id.* at pp. 648-649.)

The Supreme Court expressly foreclosed the interpretation that LACCD places on the *Lazar* proposition in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1176, fn. 4. There, the plaintiff maintained that under *Lazar*, "fraud plaintiffs generally may recover benefit-of-the-bargain damages as well as out-of-pocket damages." (*Ibid.*) Rejecting that interpretation of *Lazar*, the court stated: "[O]ur reference in that decision to benefit-of-bargain damages was to their recovery under a contract cause of action." (*Ibid, italics omitted.*) As LACCD did not assert a claim for breach of contract, neither *Lazar* nor *Robinson Helicopter* supports a recovery for the costs of a new service elevator as benefit-of-the-bargain damages.[9]

LACCD also contends our decision in the first appeal established its entitlement to recover the costs of a new service elevator. We disagree. Generally, "[u]nder the rule of the law of the case, the statement by an appellate court of a rule of law necessary to the decision of the case on appeal

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[9] *Tri-Delta Engineering, Inc. v. Insurance Co. of North America* (1978) 80 Cal.App.3d 752, 759, upon which LACCD also relies, states that a fraud claim may support a recovery of compensatory damages, but does not examine the applicable measure of damages.

conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial on appeal in the same case. [Citation.] However, the stated rule of law relied upon as the law of the case must have been necessary to the decision of the case on appeal. Obiter dicta is not included in the law of the case. [Citations.]" (*Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 917.)

Our decision in the first appeal contains no determination that LACCD was entitled to recover the costs of a new service elevator as an item of damages. The sole issue before us was whether the nonsuit on LACCD's fraud claim was properly granted due to insufficient evidence of damages. (*700 Wilshire*, *supra*, 2011 Cal.App. Unpub. LEXIS 8558 at pp. *24-25.) In discussing the nonsuit motion, we noted that LACCD, in opposing the motion, asserted that its compensatory damages included "the replacement cost of the damaged subterranean elevator," although LACCD had presented no evidence establishing that cost. (*Id*. at p. *22.) Reversing the nonsuit, we concluded that the evidence at the first trial was "sufficient to support a finding that as a result of being fraudulently induced to authorize the work on the alley, [LACCD] incurred damages, including the cost of installing and removing the bollards that it placed around the damaged elevator doors to prevent further damage to the doors or vehicles driving over the doors." (*Ibid*.)

In so concluding, we rejected Roosevelt Lofts' contention that a negligence claim was a prerequisite for compensatory damages, stating: "Under California law, compensatory damages are recoverable for intentional fraud [citation] and promissory fraud [citations]. We need not address Roosevelt's contention that District failed to allege a claim for promissory fraud, because that was not the basis of the motion for nonsuit." (*700 Wilshire*, *supra*, 2011 Cal.App. Unpub. LEXIS 8558, at pp. *43-44.) In a footnote, we further stated: "Although [LACCD] did not present evidence of the cost of replacing the service elevator at trial, we do not suggest that such cost is not a proper source of damages. We state *only* that the evidence [LACCD] did present was sufficient to avoid nonsuit." (*700 Wilshire*, *supra*, at p. *43, fn. 10.) Accordingly, our decision contains no determination that LACCD was entitled to recover the costs of replacing what it had described as "the damaged subterranean elevator." (*700 Wilshire*, *supra*, at p. *37.) In sum, damages for the installation of a new service elevator were improperly awarded.

B. *Award of Attorney Fees Under "Tort of Another" Doctrine*

We turn to Roosevelt Lofts' challenge to the award of attorney fees as damages under the "tort of another" doctrine. That award was predicated on LACCD's participation in litigation involving GSR, namely, Roosevelt Lofts' bankruptcy proceeding, the underlying action, and

LACCD's quiet title action against GSR. As explained below, the award was improper under the "tort of another" doctrine.

1. *Governing Principles*

The leading case regarding the recovery of attorney fees as damages is *Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618 (*Prentice*). There, after an escrow company mishandled a transaction involving the sale of real property, the sellers initiated an action against the escrow company and the buyers. (*Id.* at pp. 619-620.) The trial court quieted title in favor of the sellers and concluded that the escrow company had been negligent in closing the sale. (*Id.* at p. 620.) As damages for this negligence, it awarded the sellers the attorney fees they incurred in their action against the buyers. (*Ibid.*)

Our Supreme Court affirmed the award, notwithstanding the general rule that parties must bear their own attorney fees. (*Prentice*, *supra*, 59 Cal.2d at p. 620.) The court stated: "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Ibid.*) In such cases, the attorney fees and related expenses constitute "damages wrongfully caused by [the] defendant's improper actions." (*Id.* at p. 621.) For purposes of such an award, the

litigation involving the third party may occur in the action against the tortfeasor or in a separate action. (*Ibid.*)

As explained in *Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310 (*Sooy*), the "'tort of another'" doctrine, as set forth in *Prentice*, is not a genuine exception to the rule obliging parties to pay their own attorney fees, but an application of the principles governing tort damages. Under the doctrine, "necessary attorney fees incurred in third party litigation which is proximately and foreseeably caused by a tortfeasor are recoverable as damages in an action against the tortfeasor." (*Id.* at p. 1312.)

Application of the doctrine is subject to certain restrictions pertinent here. First, no recovery is permitted for fees incurred in litigation directed against the tortfeasor, even though other parties are incidentally involved. (*Schneider v. Friedman, Collard, Poswall & Virga* (1991) 232 Cal.App.3d 1276, 1281 (*Schneider*); see *Lewis v. Edmonds* (1987) 190 Cal.App.3d 1101, 1104.) In *Schneider*, a law firm asserted a medical malpractice claim on behalf of a minor and secured an arbitration award that failed to provide for attorney fees. (*Schneider*, *supra*, 232 Cal.App.3d at p. 1278.) Upon discharging the firm, the minor's family fell into a dispute with the firm regarding its fees, which was litigated in an interpleader action instituted by the bank holding the funds awarded in the arbitration. (*Id.* at p. 1279.) The interpleader action resulted in a judgment awarding the firm considerable fees. (*Id.* at pp. 1279-1280.) When that judgment was reversed on appeal, the minor's

family sued the firm for breach of fiduciary duty, seeking as damages attorney fees they incurred in the interpleader action. (*Id.* at pp. 1280-1281.) After summary judgment was granted in the firm's favor on the claims, the appellate court held that those fees were not recoverable under the "tort of another" doctrine, stating: "[T]he fees sought by the [minor's family] were incurred in litigation with the . . . firm which is not a third party. The fact that the interpleader action was filed by a third party -- [the bank] -- does not change the fact that the litigation was between the [family] and [the firm]." (*Id.* at p. 1281.)

Second, no recovery is permitted for fees incurred in litigation involving a third party sharing the same interests as the tortfeasor. In *Golden West Baseball Co. v. Talley* (1991) 232 Cal.App.3d 1294, 1298-1299, disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526-527 (*Golden West Baseball*), a baseball club initiated a quiet title action against a city, seeking to resolve disputes regarding a lease negotiated by the city manager. While that action was pending, the baseball club filed a fraud action against the city manager, alleging that he had made misrepresentations while negotiating the lease. (*Id.* at p. 1299.) The only damages the baseball club claimed in the fraud action were the attorney fees it incurred in the quiet title action. (*Id.* at pp. 1301-1302.) After summary judgment was granted in the city manager's favor in the fraud action, the appellate court affirmed, concluding that "tort of another" damages were unavailable to the baseball

club because it offered no evidence that the city manager's interests regarding the lease diverged from those of the city. (*Id*. at p. 1302.)

Third, fees incurred in third party litigation may be recovered from a defendant only when that litigation is "'the natural and probable consequence'" of the defendant's tortious conduct. (*Electrical Electronic Control, Inc. v. Los Angeles Unified School Dist*. (2005) 126 Cal.App.4th 601, 616, 617, quoting *Prentice*, *supra*, 59 Cal.2d at p. 621.) Thus, no recovery is permitted for fees incurred in litigation arising from the third party's independent conduct. (*Electrical Electronic Control, Inc.*, *supra*, at p. 617 [award of fees incurred in breach of contract action against third party was improper because third party's breach of contract was independent of defendant's negligence]; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 81 [no award was proper for fees incurred in litigation against third parties whose negligence was independent of defendant's negligence].)

2. *Analysis*

For the reasons explained below, we conclude that the "tort of another" doctrine does not support the award of fees relating to Roosevelt Lofts' bankruptcy proceeding, the underlying action, and LACCD's quiet title action against GSR.

a. *No Recovery For Fees Incurred in the Bankruptcy Proceeding Prior to Our Decision in the First Appeal*

To the extent the award reflects the fees that LACCD incurred in Roosevelt Lofts' bankruptcy proceeding prior to our decision in the first appeal, the award fails for want of evidence that the pre-decision portion of the bankruptcy proceeding constituted "an action against" GSR (*Prentice*, *supra*, 59 Cal.2d at p. 620). After LACCD asserted a claim in that proceeding as a creditor against Roosevelt Lofts' bankruptcy estate, the bankruptcy court confirmed a reorganization plan transferring to GSR the Roosevelt Building, the appurtenant alley easement, and Roosevelt Lofts' rights regarding the initial judgment in the underlying action. Relying on the confirmed reorganization plan, GSR secured the right to substitute in as respondent in the first appeal before us. Nothing in the record suggests that prior to our decision in that appeal, LACCD litigated any issue against GSR in the bankruptcy proceeding.[10] Accordingly, the record shows only that the pre-decision litigation in the bankruptcy proceeding was between

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[10] Although Jeter testified that at LACCD's request, the bankruptcy court ordered that buyers of condominiums in the Roosevelt Building be apprised of the first appeal in the underlying action, there is no evidence that GSR opposed that request.

LACCD and Roosevelt Lofts. (*Schneider*, *supra*, 232 Cal.App.3d at p. 1280.)

LACCD's reliance on *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101 is misplaced. There, a developer sought a loan from a bank to be secured by a mortgage. (*Id*. at p. 114.) To obtain the loan, the developer falsely promised that a pre-existing mortgage held in part by a third party would be eliminated before the bank's mortgage was recorded. (*Id.* at pp. 128-130.) After the developer defaulted on the loan, the bank initiated foreclosure proceedings and a fraud action. (*Id*. at pp. 118-119.) To forestall foreclosure, the developer filed a Chapter 11 bankruptcy petition and secured an injunction based on the pre-existing mortgage held in part by a third party. (*Id*. at p. 130.) After securing an order from the bankruptcy court subordinating the pre-existing mortgage, the bank completed the foreclosure and prevailed in its fraud action. (*Id*. at pp. 119-122.) The appellate court concluded that the bank was properly awarded the fees it incurred in the bankruptcy proceeding because "[it] was compelled to litigate [the] issue [relating to the pre-existing mortgage] in the bankruptcy court . . . ." (*Id*. at p. 150.) In contrast, LACCD litigated no issues relating to GSR prior to our decision in the first appeal. For that reason, it may not recover any fees it incurred during that portion of the bankruptcy proceeding.

b. *No Recovery For Fees Incurred in the First Appeal*

To the extent the award reflects the fees incurred by LACCD in the first appeal after GSR was substituted in as respondent, the award fails because GSR represented Roosevelt Lofts' interests in the judgment at issue in that appeal. As noted above (see pt. B.2.a. of the Discussion, *ante*), the confirmed reorganization plan transferred to GSR the initial judgment in the underlying action, together with the Roosevelt Building and appurtenant alley easement. Generally, the assignment of a judgment conveys the assignor's rights and remedies regarding the judgment to the assignee. (*Cal-Western Business Services, Inc. v. Corning Capital Group* (2013) 221 Cal.App.4th 304, 310-311.) In granting Roosevelt Lofts' and GSR's joint request for substitution, we ruled that GSR was "substituted . . . in its place . . . of [Roosevelt Lofts] as [r]espondent for all purposes in this action . . . ." Because GSR's interests in the judgment under appeal were identical to those of Roosevelt Lofts, LACCD may not recover the fees it incurred in the first appeal. (*Golden West Baseball*, *supra*, 232 Cal.App.3d at p. 1302.)

c. *No Recovery For Fees Incurred After the First Appeal*

To the extent the award reflects the fees incurred by LACCD following the first appeal, the award is improper because the pertinent litigation resulted from GSR's

independent conduct, and thus was not "'the natural and probable consequence'" of Roosevelt Lofts' fraud. (*Electrical Electronic Control, supra,* 126 Cal.App.4th at pp. 616-617.) After the first appeal, GSR contended in the underlying action and the bankruptcy proceeding that it was not bound by our conclusion that Roosevelt Lofts' use of the alley for private vehicular traffic overburdened the alley easement. Thereafter, GSR's entitlement to continue using the alley was litigated in the underlying action, the bankruptcy proceeding, and the quiet title action. As explained below, GSR's initiation of litigation regarding the easement, despite our decision, was not "proximately and foreseeably caused" by Roosevelt Lofts' fraud. (*Sooy*, *supra,* 220 Cal.App.3d at p. 1312.)

With respect to torts such as fraud and negligence, the determination of proximate causation is subject to the rules concerning intervening forces and superseding causes. (*Wells v. Lloyd IV* (1936) 6 Cal.2d 70, 79-87; *Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1030-1031 (*Brewer).*)[11] Under

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[11] "'An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.' (Rest.2d Torts, § 441, subd. (1) . . . .) Whether it prevents an actor's antecedent negligence from being a legal cause of harm to another is determined by other rules (§ 441, subd. (2)), chiefly those governing the related concept of superseding cause." (*Brewer, supra,* 40 Cal.App.4th at pp. 1030-1031.) These rules are set out in sections 442 through 453 of the
(Fn. continued on next page.)

those rules, the chain of proximate causation may be broken when a party intervenes with full knowledge of the pertinent circumstances.

In *Stultz v. Benson Lumber Co.* (1936) 6 Cal.2d 688, 689, a lumber company sold a defective plank to two builders. The two builders knew that the plank was defective, but they used the plank as scaffolding. (*Ibid.*)

Restatement Second of Torts, and have been accepted as law in California. (*Stewart v. Cox* (1961) 55 Cal.2d 857, 863-864; *Cline v. Watkins* (1977) 66 Cal.App.3d 174, 179.)

Restatement Second of Torts section 452 states: "(1) Except as stated in Subsection (2), the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm. [¶] (2) Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause."

Witkin states a similar rule: "Where, subsequent to the defendant's negligent act, an independent intervening force actively operates to produce the injury, the chain of causation may be broken. It is usually said that if the risk of injury might have been reasonably foreseen, the defendant is liable, but that if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen and hence not foreseeable, it is a *superseding cause*, and the defendant is not liable. [Citations.]" (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1197, p. 574.)

The scaffold collapsed, injuring their employee, who sued the lumber company and his employers. (*Ibid*.) The court in *Stultz* held that the builders' negligence was an intervening cause that broke the chain of causation stemming from the lumber company, concluding that when the builders erected the scaffold with the defective plank, knowing it to be defective, any negligence in the construction of the scaffold became their exclusive responsibility. (*Id*. at pp. 693-695.)

In *Brewer,* a driver repeatedly struck another vehicle with his car, causing the innocent driver to fear for his life. (*Brewer, supra,* 40 Cal.App.4th at pp. 1027-1028.) The innocent driver fled the accident scene in his vehicle, and was subsequently arrested and prosecuted for a felony (apparently, hit-and-run). (*Ibid*.) The appellate court held that the criminal prosecution was a superseding cause of the innocent driver's defense costs due to the prosecution, concluding that the prosecution was unforeseeable and unlikely because it stemmed from "the considered and careful judgment of a number of persons," including the prosecutor. (*Id*. at pp. 1028, 1036-1037.)

We reach the same conclusion regarding GSR's conduct following the first appeal. After participating in the first appeal, GSR continued to seek to use the alley for private vehicular traffic, notwithstanding our decision in the first appeal. In asserting an entitlement to use the alley for that purpose, GSR maintained that it acted on its own behalf, rather than as the representative of Roosevelt Lofts. Because GSR pursued that course of action with knowledge

of the facts and our decision in the first appeal, it must be regarded as an unforeseeable and independent act that broke the chain of proximate causation following Roosevelt Lofts' fraud. For that reason, the fees incurred by LACCD in litigation against GSR following the first appeal may not be recovered under the "'tort of another'" doctrine. (*Electrical Electronic Control, Inc.*, *supra*, 126 Cal.App.4th at pp. 616-617.)

Sindell v. Gibson, Dunn & Crutcher (1997) 54 Cal.App.4th 1457 and *Beraksa v. Stardust Records, Inc.* (1963) 215 Cal.App.2d 708 (*Beraksa*), upon which LACCD relies, are distinguishable. In *Sindell*, the plaintiffs asserted a negligence claim against a law firm, alleging that because the firm prepared their father's will without obtaining a necessary consent from his spouse, litigation ensued between the plaintiffs and the spouse following his death. (*Id.* at p. 1460.) The appellate court held that the plaintiff stated a tenable claim for damages under the "'tort of another'" doctrine, concluding that the firm's alleged failure to secure the consent caused the litigation regarding the father's estate. (*Id.* at pp. 1471.) The court noted that because the firm negligently failed to obtain the spouse's consent when the will was prepared, she retained the right to challenge the will. (*Ibid.*)

No such causal chain is present here. Unlike the law firm's negligence, which involved the mishandling of inheritance rights, Roosevelt Lofts' fraud was aimed primarily at facilitating a physical use of the alley, namely,

introducing private vehicular traffic, rather than at altering existing rights regarding the alley easement. After GSR acquired Roosevelt Lofts' rights regarding the easement and appeared in the first appeal, we determined that the right in question did not permit that use of the alley. For the reasons discussed above, GSR's decision to pursue an entitlement to use the alley for private vehicular traffic notwithstanding our decision in the first appeal cannot be regarded as the proximate result of the fraud.

In *Beraksa*, the pertinent tortious acts involved a fraudulent transfer of rights. There, a corporation controlled by a single individual owned and operated a bar. (*Beraksa*, *supra*, 215 Cal.App.2d at pp. 711-712.) After that individual died, the defendants improperly held themselves out as the duly elected officers of the corporation, and engaged in a fraudulent sale of the bar to purchasers unaware of the defendants' misconduct. (*Id.* at p. 712.) Following that purported sale, the legal heirs of the deceased principal of the corporation reestablished control of the corporation and took successful legal action to recover the bar from its purchasers. (*Ibid.*) Later, in the corporation's lawsuit against the defendants, the appellate court affirmed an award of damages to the corporation encompassing the attorney fees it incurred in recovering the bar. (*Id.* at pp. 717-718.) Here, in contrast with *Beraksa*, the litigation underlying the fee award involved a fully informed third party whose considered decision to precipitate that litigation broke the chain of proximate

causation. In sum, the award of attorney fees as damages was improper under the "tort of another" doctrine.[12]

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[12] The other cases upon which LACCD relies are inapposite, as none discusses or applies the "tort of another" doctrine. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 623-624 [affirming fee award under private-attorney-general theory]; *Globalist Internet Technologies, Inc. v. Reda* (2008) 167 Cal.App.4th 1267, 1273-1276 [concluding that party was entitled to fee award under Code of Civil Procedure section 685.040, which authorizes the recovery of fees as costs of enforcing a judgment]; *Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, 934-938 [affirming fee award under Code of Civil Procedure section 685.040].)

DISPOSITION

The judgment is reversed with respect to the award of $91,273 for the costs of installing a new service elevator, the award of $294,271 in attorney fees, and the award of $50,881 for pre-judgment interest regarding those fees, and is affirmed in all other respects. Roosevelt Lofts is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.